

OFFICE OF THE ELECTION OFFICER
% INTERNATIONAL BROTHERHOOD OF TEAMSTERS
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Michael H. Holland
Election Officer

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October 23, 1991

VIA UPS OVERNIGHT

Wayne Wosnick
3525 18th Street
Kenosha, WI 53142

Commercial Carriers, Inc.
620 Roosevelt Road
West Chicago, Illinois 60607

Joseph White
Supervisor
Commercial Carriers, Inc.
620 Roosevelt Road
West Chicago, Illinois 60607

William D. Joyce
President, IBT Local Union 710
4217 South Halsted Street
Chicago, Illinois 60609

Re: Election Office Case No. P-910-LU710-CHI

Gentlemen:

A protest was filed pursuant to Article XI of the *Rules for the IBT International Union Delegate and Officer Election*, revised August 1, 1990 ("Rules") by Wayne Wosnick, a member of Local Union 710. Mr. Wosnick contends that on September 16, 1991, he was ordered to remove two Ron Carey campaign stickers from the trailer of his vehicle in violation of the *Rules*.

This protest was investigated by Adjunct Regional Coordinator Deborah Schaaf. Mr. Wosnick is an owner-operator who performs services for Commercial Carriers, Inc. Mr. Wosnick advised Ms. Schaaf that on September 16, 1991, Joe White, terminal manager of Commercial Carriers, Inc. located in West Chicago, Illinois, ordered him to remove two Ron Carey campaign stickers from the trailer of his vehicle. Mr. Wosnick states that he has had these stickers affixed since mid-April of 1991. However, Mr. White refused to dispatch him until he removed the stickers.¹ He was not asked to remove nor did he remove other bumper stickers which were unrelated to the International Union officer election.

In addition to Mr. Wosnick, the investigator spoke to eight other owner-operators who perform services for Commercial Carriers, Inc. from its West Chicago terminal. All of these IBT members including Mr. Wosnick stated that they have never seen or

¹ Mr. Wosnick also contended that campaign literature was removed from the bulletin board in the drivers room by Joe White. That allegation has been addressed in the determination in Election Office Case No. P-890-LU710-CHI.

heard of a company policy prohibiting the placement of stickers on either the cab or trailer of their vehicles. Six of the eight individuals interviewed stated that they either presently have or have had stickers affixed to their cabs and/or trailers or have seen other cabs or trailers with stickers affixed. The content of these stickers include advertisements, slogans, scenic messages and the like. One of the eight members stated that he presently displays a Carey sticker on his vehicle along with several other stickers, although he admits that since Mr. White's directive to Mr. Wosnick he parks his vehicle so that the Carey sticker is not easily detected.

A. J. McKune, Director of Labor Relations for Commercial Carriers, Inc., states that the company has never permitted nor condoned the use of any unauthorized stickers on its trailers. The investigation conducted by the Election Officer requires a conclusion to the contrary. Indeed, Mr. Wosnick, although he was forced to remove Carey stickers, was allowed to keep two other stickers on his vehicle, one being an "I Love Country Music" sticker and the other being a "Tennessee" sticker. The question then becomes whether the direction to Mr. Wosnick to remove the stickers from his vehicle constitutes a violation of the *Rules*. For the reasons set forth below, the Election Officer determines that the *Rules* have in fact been violated.

Article VIII, § 10(d) of the *Rules* provides that:

No restrictions shall be placed upon candidates' or members' pre-existing rights to use employer or Union bulletin boards for campaign publicity. Similarly, no restrictions shall be placed upon candidates' or members' pre-existing rights to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events or engage in similar activities on employer or Union premises.

As noted above, the company has no written policy and has not enforced any oral policy restricting the placement of stickers on any part of the vehicle, including the trailer, prior to its direction to Mr. Wosnick. Further, the policy the company now seeks to impose is a discriminatory one; the policy only affects stickers having a political content. Under Article VIII, § 10(d) of the *Rules*, the company may not now begin strict enforcement of its policy to prevent the display of campaign materials. Similarly, Article VIII, § 10(d) of the *Rules* prevents the promulgation or enforcement of a policy which is based on the type of material being displayed. See Helton v. NLRB, 656 F. 2d 883 (D.C. Cir., 1981); see also Advisory Regarding Political Rights, issued December 28, 1990.

Accordingly, the protest is GRANTED. Commercial Carriers, Inc. is directed to allow IBT members to place or affix stickers and similar campaign items on the vehicles, both cabs and trailers, driven by IBT members while they are performing

Wayne Wosnick
Page 3

services for the company.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,

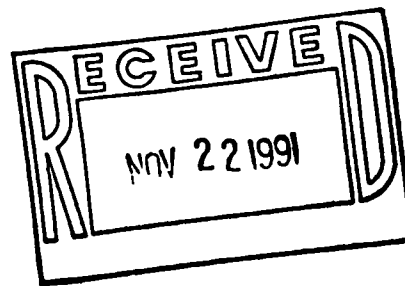


Michael H. Holland

MHH/mjv

cc: Frederick B. Lacey, Independent Administrator
Julie E. Hamos, Regional Coordinator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 -v- :
 :
 INTERNATIONAL BROTHERHOOD OF :
 TEAMSTERS, CHAUFFEURS, :
 WAREHOUSEMEN AND HELPERS OF :
 AMERICA, AFL-CIO, et al., :
 :
 Defendants. :
-----X

OPINION & ORDER
88 CIV. 4486 (DNE)

P910

APPEARANCES: OTTO OBERMAIER, United States Attorney for the Southern District of New York (Edward T. Ferguson, III, Assistant United States Attorney, of counsel) for the United States of America;

WEIL, GOTSHAL & MANGES, New York, New York (Mark A. Jacoby, of counsel) and DEAN & FULKERSON, Troy, Michigan (R. Ian Hunter and Robert L. Mercado, of counsel) for Commercial Carrier.

EDELSTEIN, District Judge:

This decision arises from the implementation of the rules for the International Brotherhood of Teamsters ("IBT") International Union Delegate and Officer Election (the "Election Rules"), promulgated by the Election Officer and approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). The Election Rules govern the first-ever direct rank and file election of IBT International officers, currently in progress. The Election Officer was appointed by the Court pursuant to its March 14, 1989 Order (the "Consent Decree") in this action. In an October 23, 1991 decision in Election Office Case No. P-910-LU710-CHI, the Election Officer determined that Commercial

Carriers, Inc. ("Commercial") violated the Election Rules by preventing Wayne Wosnick from engaging in IBT International Union election campaign activity protected by the Election Rules. Commercial is a Michigan corporation engaged in the transportation of new and used trucks and automobiles. See Affidavit of Ralph O. Thompson, at 2. Wosnick is a member of defendant International Brotherhood of Teamsters (the "IBT") and an owner-operator who performs services for Commercial. The protected campaign activity in question is Wosnick's display of campaign bumper stickers on the trailer of his vehicle. The Election Officer ordered Commercial to allow Wosnick and other IBT members who perform services for Commercial to engage in such campaign activity. Commercial had the right under the Election Rules to appeal this decision to the Independent Administrator, who was appointed by this Court pursuant to the Consent Decree. Instead of asserting its rights in this manner, however, Commercial simply refused to comply with the Election Officer's order. Commercial also commenced an action in the United States District Court for the Eastern District of Michigan, styled Common Carriers v. United States, No. 91-CV-75871-DT (E.D. Mich), in which it sought to avoid compliance. The district court dismissed the action and Commercial has appealed the dismissal to the United States Court of Appeals for the Sixth Circuit, Dkt. No. 91-2247.

Based on Commercial's conduct, the plaintiff United States of America (the "Government") brought an order to show cause why this Court should not enter an order pursuant to its continuing

supervisory jurisdiction over the Consent Decree, the All Writs Act, 28 U.S.C. §1651(a), and the Court's inherent equitable power: (1) affirming and directing Commercial to comply fully within, twenty-four hours of the filing of this opinion and order, with the October 23, 1991 decision of the Election Officer in Election Office Case No. P-910-LU710-CHI, by allowing Wayne Wosnick and all other IBT members who perform services for Commercial to engage in IBT International Union election campaign activity protected by the Election Rules (including displaying campaign bumper stickers on their vehicles while performing services for Commercial), and to send a notice to that effect to all such IBT members; (2) directing Commercial to cause the dismissal, within twenty-four hours of the filing of this opinion and order, of its appeal to the United States Court of Appeals for the Sixth Circuit, Dkt. No. 91-2247, from the dismissal of the action styled Common Carriers v. United States, No. 91-CV-75871-DT (E.D. Mich); (3) in the event that Commercial fails to take any of the actions directed in (1) and (2) above, adjudging Commercial in civil contempt and imposing coercive sanctions, including substantial daily fines of at least \$10,000 per day until such time as Commercial fully complies as directed; and (4) awarding the Government and the Election Officer such other relief, including their attorney's fees in this matter, as this Court deems appropriate.

I. BACKGROUND

The Election Officer was appointed by the Court pursuant to the Consent Decree, which was agreed to by the plaintiff Government and the defendant IBT in settlement of the bulk of this civil racketeering action. The Election Officer is empowered to supervise the implementation of the Consent Decree's electoral provisions, culminating in the first-ever direct rank and file election of IBT International officers. See Consent Decree, ¶12(D); October 18, 1989 Opinion & Order, 723 F. Supp. 203, 206-07 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. Dec. 13, 1989), cert. denied, 110 S. Ct. 2618 (1990). Pursuant to his supervisory authority, the Election Officer promulgated the Election Rules, which were approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). The Election Rules are the linchpin of the Consent Decree's efforts to cleanse the IBT of La Cosa Nostra's corrupt influences. October 18, 1989 Opinion & Order, 723 F. Supp. at 206-07; October 25, 1991 Order, slip opinion at 1 (S.D.N.Y. 1991). The Election Rules protect, inter alia, the rights of IBT members to participate in union election campaign activities, see Art. VIII, §10(a)&(d), and enable the Election Officer to respond to violations of the Election Rules, or any other conduct preventing a fair, honest, and open election, with a wide range of remedial measures. See Art. XI, §2. The first-ever direct rank and file election of IBT International officers is currently in progress. Ballots were mailed out between November 7, 1991 and November 12, 1991, and are

to be returned by December 10, 1991. See International Union Officer Election Plan, Art. I&II.

A. Commercial's Violation of the Election Rules

This matter involves the election protest of Wayne Wosnick, a member of IBT Local 710 and an owner-operator who performs trucking services for Commercial.¹ On September 16, 1991, Joe White, the terminal manager at Commercial's West Chicago, Illinois terminal, ordered Wosnick to remove from the back of his tractor-trailer two bumper stickers that advocated the candidacy of Ron Carey for IBT General President. The bumper stickers had been on the trailer since mid-April. White did not order Wosnick to remove other bumper stickers on the trailer; these other stickers did not pertain to the IBT election or other union matters. Because White told Wosnick that he would not dispatch him until he removed the Carey bumper stickers, Wosnick removed them.

Wosnick protested this matter by telephone call to the Election Officer on the same day and followed up with a written protest two days later. By overnight letter dated September 18, 1991, the Election Officer sent Commercial a copy of the protest and advised the company to provide any relevant information immediately to the Election Office staff member investigating the protest.

In an October 22, 1991 memorandum to all owner-operators at

¹ The following account is based on the Election Officer's investigation into the protest filed by Wosnick.

Commercial's West Chicago terminal, White stated: "Effective October 31, 1991, you will not be dispatched if you have nonessential decals/stickers on either the tractor or the trailer Only those decals/stickers provided by the company will be allowed." Wosnick received a copy of this memorandum with his paycheck on October 30, 1991.

The Election Office's investigation included interviews with Wosnick and eight other owner-operators who perform trucking services for Commercial, as well as with A.J. McKune, Commercial's Director of Labor Relations. In an October 23, 1991 decision, the Election Officer concluded that in requiring Wosnick to remove his Carey bumper stickers, Commercial had violated Article VIII, Section 10(d) of the Election Rules, which states in relevant part:

No restrictions shall be placed upon candidates' or members' pre-existing rights to use employer or Union bulletin boards for campaign publicity. Similarly, no restrictions shall be placed upon candidates' or members' pre-existing right to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events or engage in similar activities on employer or Union premises.

The Election Officer's conclusion was based on the fact, inter alia, that Commercial had previously permitted owner-operators performing services for the company to display non-essential bumper stickers on their vehicles. Accordingly, the Election Officer directed Commercial to allow owner-operators who are IBT members to have IBT election campaign bumper stickers on their vehicles. The Election Officer also informed Commercial of its right under the Election Rules to request, within twenty-four hours of its

receipt of the decision, a hearing before the court-appointed Independent Administrator. See Election Rules, Art. XI, §1(a)(5).

Commercial did not appeal to the Independent Administrator as provided in the Election Rules. The Election Rules provide that if no appeal is taken from a determination of the Election Officer, "that determination shall become final and binding." Election Rules, Art. XI, §1(a)(6). Wosnick thereafter put his Carey bumper stickers back on his vehicle.

B. Commercial's Refusal to Comply

By letter to the Election Officer dated October 29, 1991, Commercial stated that it would not comply with the Election Officer's directive. Accordingly, by letter to the Government dated November 1, 1991, the Election Officer requested that the Government institute appropriate contempt proceedings against Commercial. By letter to Commercial's counsel dated November 4, 1991, the Government demanded that Commercial comply with the Election Officer's directive within two days or face civil contempt proceedings before this Court. The Government specifically informed Commercial of the Second Circuit's recent decision in United States v. IBT, No. 91-6096 slip op. at 8379 (2d Cir. Oct. 29, 1991) ("Yellow Freight"), and also enclosed a copy of the decision with the letter.

On November 5, 1991, Commercial refused to dispatch Wosnick until he removed all bumper stickers on his trailer, including those that supported Carey. The following day, Commercial

commenced a civil action against the Government and the Election Officer in the United States District Court for the Eastern District of Michigan, seeking to enjoin the Election Officer's order and also seeking to enjoin the Government from instituting contempt proceedings against the company for its failure to comply with that order.

Having already instituted the Michigan suit and having let over a week elapse after it stated its refusal to comply with the Election Officer's decision, Commercial sent a letter dated November 6, 1991 to the Independent Administrator in which it attempted to appeal from the Election Officer's October 23, 1991 decision. By letter to Commercial dated November 8, 1991, the Independent Administrator rejected the attempt as untimely under the Election Rules and, given Commercial's Michigan litigation, concluded that Commercial attempted the appeal in bad faith. By order dated November 7, 1991, United States District Judge Woods, by United States District Judge Robert E. DeMascio, acting in Judge Woods's absence, denied Commercial's motion for a temporary restraining order. By order dated November 8, 1991, Judge Woods dismissed Commercial's suit.

On November 11, 1991, Commercial appealed to the United States Court of Appeals for the Sixth Circuit from the dismissal of its Michigan suit, and moved for expedited appeal and immediate injunctive relief pending appeal. On November 15, 1991, the Government brought the instant order to show cause. This Court signed the Order to Show Cause and made it returnable for November

18, 1991, at 9:00 a.m., at which time this Court heard argument from both the Government and Commercial. Commercial handed its objections and memorandum of law to the Government and the Court at the hearing.

II. DISCUSSION

The Government moves this Court to affirm the Election Officer's October 23, 1991 decision in Election Office Case No. P-910-LU710-CHI, and seeks an order from this Court directing compliance with the decision and a withdrawal of Commercial's Sixth Circuit appeal within twenty-four hours under pain of contempt. In response to the Government's order to show cause, Commercial argues that: (1) this Court lacks subject matter jurisdiction because Commercial is not a party to the Consent Decree; (2) this Court lacks personal jurisdiction over Commercial; (3) the Election Officer's decision violates the Election Rules; (4) the Election Officer's ability to adjudicate this matter is preempted by the National Labor Relations Board (the "NLRB"); (5) the Election Officer's decision violates NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); (6) the All Writs Act does not empower this Court to order Commercial to cause the dismissal of its Sixth Circuit lawsuit; (7) the Election Officer's decision violates the First Amendment to the United States Constitution; (8) the Government's order to show cause violates Local Civil Rule 43; and (9) service of process was deficient.

This Court finds that Commercial waived its objections to the

Election Officer's October 23, 1991 decision by failing to appeal it, and, in the alternative, that Commercial's objections are wholly without merit. Indeed, Commercial has virtually ignored the controlling decisions of the Second Circuit and this Court.

A. Waiver

The Election Rules have the force of Court Orders and are "enforceable upon pain of contempt." July 10, 1990, Opinion & Order, 742 F. Supp. 94, 108 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991). Article XI, Section 1(a), of the Election Rules provides the procedure for making preelection protests and appealing decisions of such protests. Preelection protests must be brought in the first instance to the Election Officer, See Art. XI, §1(a)(3), and an appeal may be taken to the Independent Administrator, See Art. XI, §1(a)(5). Further, an appeal can be taken from the Independent Administrator's decision to this Court, and from this Court to the Second Circuit Court of Appeals. See, e.g., United States v. IBT, No. 91-6096 (2d Cir. Oct. 29, 1991) ("Yellow Freight"). Pursuant to Article XI, Section 1(a)(6), "[i]f no appeal is taken from the determination of the Election Officer or his representative, that determination shall become final and binding."

Commercial did not take the opportunity to appeal the October 23, 1991 determination of the Election Officer as provided for in the Election Rules. Instead, by letter to the Election Officer dated October 29, 1991, Commercial stated that it would not comply

with the Election Officer's decision. In a letter dated November 4, 1991, the Government demanded of Commercial's counsel that Commercial comply with the Election Officer's decision within two days or face civil contempt proceedings before this Court. The Government specifically informed Commercial of the Second Circuit's recent decision in Yellow Freight, No. 91-6096 slip. op. at 8379 (2d Cir. Oct. 29, 1991), and also enclosed a copy of the decision with the letter.

By letter dated November 5, 1991, Commercial refused to dispatch Wosnick until he removed all bumper stickers on his trailer, including those that supported Carey. The following day, Commercial commenced a civil action against the Government and the Election Officer in the United States District Court for the Eastern District of Michigan, seeking to enjoin the Election Officer's order and also seeking to enjoin the Government from instituting contempt proceedings against the company for its failure to comply with that order.

After flouting the Election Officer's decision and the Consent Decree's appeal process, Commercial sent a letter dated November 6, 1991 to the Independent Administrator in which it attempted to appeal from the Election Officer's October 23, 1991 decision. By letter to Commercial dated November 8, 1991, the Independent Administrator rejected the attempt as untimely under the Election Rules and, given Commercial's Michigan litigation, as made in bad faith. The findings of the Independent Administrator are "entitled to great deference." United States v. IBT, 905 F.2d 610, 616 (2d

Cir. 1990). This Court will overturn the findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." October 29, 1991 Opinion & Order, slip op. at 17-18 (S.D.N.Y. 1991) (numerous citations omitted). Given Commercial's refusal to comply with the Election Officer's decision or seek a timely appeal under the Election Rules, the Government's November 4, 1991 letter, and the lawsuit filed by Commercial in the Eastern District of Michigan, the Independent Administrator's decision was fully supported by the record.

Commercial's failure to appeal the Election Officer's October 23, 1991 decision makes that decision "final and binding." See Election Rules, Art. XI, §1(a)(6) (emphasis added). By failing to appeal in timely manner under the Election Rules, Commercial has waived its rights to contest the merits of the Election Officer's decision. Commercial cannot reasonably argue that it chose to stay out of court in order to avoid waiving any jurisdictional arguments. The Government sent Commercial a copy of the Second Circuit's decision in Yellow Freight on November 4, and the decision had been available since October 29. The employer in Yellow Freight appealed the Election Officer's decision to the Independent Administrator, and appealed his decision to this Court, and appealed this Court's decision to the Second Circuit Court of Appeals. See Yellow Freight, No. 91-6096 slip. op. at 8379 (2d Cir. Oct. 29, 1991). At no time did Yellow Freight waive its jurisdictional arguments.

Furthermore, it is all too attractive an option for parties in Commercial's position to flout the decisions of the Election Officer and the Independent Administrator as the IBT election is in process, hoping either that the Government will not have time to bring an order to show cause to this Court to force compliance, or that this Court will not have time to deal with a plethora of groundless objections, or that this Court or the Second Circuit will grant a stay, delaying the issue to the point where it becomes moot.

Even if Commercial had not waived its right to contest the Election Officer's decision by failing to appeal it, it is fully supported by an amply illustrated record. The decision of the Election Officer in Election Case No. P-910-LU710-CHI is affirmed. Commercial is directed to comply with the Election Officer's decision within twenty-four hours of the filing of this opinion and order. Further, Commercial is directed to cause the dismissal of its appeal to the United States Court of Appeals for the Sixth Circuit, No. 91-2247, from the dismissal of the action styled, Common Carriers, Inc. v. United States, No. 91-CV-75871-DT (E.D. Mich. 1991), within twenty-four hours of the filing of this opinion.

B. Commercial's Objections

Even if Commercial had not waived its right to contest the merits of the Election Officer's decision, Commercial's objections are wholly without merit. Most of Commercial's objections have

been raised and rejected by the decisions of this Court and the Second Circuit. Commercial seems to abide by the proverb, "If the fool would persist in his folly he would become wise."²

1. Subject Matter Jurisdiction

Commercial argues that this Court lacks subject matter jurisdiction because the Consent Decree is not binding on non-parties. This Court has rejected identical arguments on several occasions. See October 29, 1991 Opinion & Order, slip op. at 10-11 (S.D.N.Y. 1991) ("Star Market"); October 25, 1991 Order, slip op. at 6 (S.D.N.Y. 1991) ("Sikorsky"); April 3, 1991 Opinion & Order (S.D.N.Y. 1991) ("Yellow Freight"), aff'd, No. 91-6096, slip op. at 8379 (2d Cir. October 29, 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817 (S.D.N.Y. 1991) ("Western Conference"), appeal pending, 91-6140 (2d Cir.). Further, the Second Circuit has recently rejected this argument.

In Yellow Freight, the Second Circuit determined that pursuant to this Court's authority under the All Writs Act, 28 U.S.C. § 1651, the Election Rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election. Yellow Freight, No. 91-6096, slip op. at 8388-95. The Second Circuit affirmed this Court's ruling that Yellow Freight, a company employing IBT members but not itself affiliated with the IBT, was subject to the election rules because it was in a position to

² William Blake, The Marriage of Heaven and Hell, "Proverbs of Hell," plate 7 (1790).

"frustrate the implementation of the Consent Decree and the election rules." Yellow Freight, No. 91-6096, slip op. at 8392-8393; see Star Market, slip op. at 10 (S.D.N.Y. October 29, 1991); Sikorsky, slip op. at 6 (S.D.N.Y. October 25, 1991); Western Conference, 764 F. Supp. 817, 821 (S.D.N.Y. May 13, 1991), appeal pending, 91-6140 (2d Cir.). The Second Circuit found that this Court properly exerted jurisdiction over Yellow Freight under the All Writs Act because it was necessary "in aid of this Court's jurisdiction." Yellow Freight, No. 91-6096, slip op. at 8393.

As in Yellow Freight, the Government does not seek to bind Commercial to the Consent Decree, but simply seeks to prevent Commercial from interfering with the election process. See October 29, 1991 Opinion & Order, slip op. at 10 (S.D.N.Y. 1991). Commercial's conduct presents as great a threat to the IBT membership's right to a free, fair, and honest election as did the employer's conduct in Yellow Freight. Commercial injected itself into the election process by its discriminatory conduct, namely, ordering Wosnick to remove two bumper stickers endorsing Carey. Such conduct threatens to chill the exercise of campaign rights and ultimately threatens the integrity of the election process. Like the employer in Yellow Freight, Commercial is in a position to "frustrate the implementation of the Consent Decree and the Election Rules." Accordingly, subject matter jurisdiction over Commercial is necessary in aid of this Court's jurisdiction and is proper under the All Writs Act for the limited purpose of preventing interference with the Election Rules.

2. Personal Jurisdiction

Commercial argues that this Court lacks personal jurisdiction because it does not have minimum contacts with the State of New York or this District. In making such an argument, Commercial ignores the holdings of the Second Circuit and this Court to the contrary. Personal jurisdiction is not required to bind non-parties under the All Writs Act. Yellow Freight, No. 91-6096, slip op. at 8392; January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1048 (S.D.N.Y.), aff'd, 907 F.2d 277 (2d Cir. 1990). "The All Writs Act gives the Court the power to bind those who are 'not parties to the original suit.'" Id. (quoting In re Baldwin-United Corp., 770 F.2d 328, 338 (2d Cir. 1985)). Moreover, the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §1965(d), "provides for nationwide personal jurisdiction, and this ultimately is a RICO matter." Id.; see United States v. IBT, No. 91-6096, slip op. at 8392.

In cases where Congress authorizes nationwide federal jurisdiction, the district court's jurisdiction is co-extensive with the boundaries of the United States. Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974). All that is required is sufficient "minimum contacts" with the United States, not this State or District. See United States v. IBT, 907 F.2d at 281; United States v. IBT, No. 91-6096, slip op. at 8392. Thus, a defendant who resides within the territorial boundaries of the United States is subject to personal jurisdiction under nationwide service of

process without regard to state jurisdictional statutes. See Mariash, 496 F.2d at 1143 Further, it is not necessary that the defendant have the requisite minimum contacts with the state that would exercise jurisdiction. See, e.g., F.T.C. v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981) ("a resident corporation necessarily has sufficient contacts with the United States to satisfy the requirements of due process"). Accordingly, as a corporation that resides in the United States, Commercial is subject to personal jurisdiction in this action.

3. The Election Rules

Commercial argues that the Election Officer's decision violates Article VIII, §10(d) of the Election Rules. Article VIII, §10(d) provides that:

No restrictions shall be placed upon candidates' or members' pre-existing rights to use employer or Union bulletin boards for campaign publicity. Similarly, no restrictions shall be placed upon candidates' or members' pre-existing right to solicit support, distribute leaflets or literature, conduct campaign rallies, hold fund raising events or engage in similar activities on employer or Union premises.

Commercial argues that trucks and trailers do not come within the scope of Article VIII, §10(d). Article I of the Election Rules specifically provides that "the Election Officer retains the right to interpret . . . these Rules." The Election officer's interpretation of Article VIII, §10(d), embracing Commercial's tractors and trailers, is a perfectly logical and reasonable, and well within is authority. Further, such an interpretation furthers the Election Rules stated goal of "providing for fair, honest, and

open elections." Election Rules, Preamble; see October 18, 1989 Opinion & Order, 723 F. Supp. 203, 207 (S.D.N.Y. 1989) (the Election Rules and the Consent Decree should be interpreted in a manner that furthers the goal of an open and fair election).

Even if the Election Officer's interpretation of Article VIII, §10(d) is incorrect, the Election Officer's decision is still fully consistent with the Election Rules. Commercial ignores Article XI, §2, which provides:

If as a result of any protest filed or any investigation undertaken by the Election Officer with or without a protest, the Election Officer determines that these Rules have been violated, or that any other conduct has occurred which may prevent or has prevented a fair, honest and open election, the Election Officer may take whatever remedial action is appropriate.
(emphasis added).

As Article XI, §2, makes clear, the Election Officer has the authority to determine whether conduct, other than that specifically proscribed by the Election Rules, may endanger the goal of an honest and open election. The Election Officer found that Commercial's decision at first to apply its bumper sticker policy in a discriminatory fashion, and then to wholly reverse its previous policy by barring bumper stickers, restricted IBT members pre-existing rights to engage in election campaign activity. The Election Officer reasonably concluded that Commercial's action threatened a "fair, honest and open election." Because the Election Officer's decision is consistent with Article XI, §2, and is also a valid interpretation of Article VIII, §10(d), the

Election Officer's decision does not violate the Election Rules.³

4. NLRB Preemption

Commercial argues that the National Labor Relations Board ("NLRB") has exclusive jurisdiction over the conduct at issue. In doing so, Commercial relies on San Diego Building Trades Council v. Garman, 359 U.S. 236 (1959). In Yellow Freight, the Second Circuit rejected an identical argument. The court held that Garman did not apply to the Consent Decree in this case and, therefore, that the NLRB did not have exclusive jurisdiction. Yellow Freight, No. 91-6096, slip op. at 8397. The court stated that:

We have affirmed an injunction prohibiting all members and affiliates of the IBT from initiating any legal proceeding relating to the Consent Decree "in any court or forum in any jurisdiction" (emphasis added) other than the district court from which this appeal was taken "as a necessary means of protecting the district court's jurisdiction over implementation of the Consent Decree." We did so to avoid inconsistent interpretations of, and judgments regarding, the Consent Decree, and also to avoid repetitive litigation that would distract the government and the court-appointed officers from implementation of the Consent Decree. It would be completely disruptive to rule that despite this arrangement, the district court has no authority to address any matter arising under the Consent Decree that might arguably be deemed an unfair labor practice under

³ Commercial argues that the Election Officer's remedy, contained in his October 23, 1991 decision, is impermissibly vague. The Election Officer directed Commercial "to allow IBT members to place or affix stickers and similar campaign items on the vehicles, both cabs and trailers, driven by IBT members while they are performing services for the company." This direction specifies the types of stickers and campaign items that were allowed prior to Commercial's conduct in violation of the Election Rules. The Election Officer's decision also addresses the type of stickers and materials that Wosnick and six other IBT members working for Commercial have or previously had affixed to their cab or trailers. This remedy is narrowly tailored to redress Commercial's violation.

the NLRA.

As we have stated, "a district judge can legitimately assert comprehensive control over complex litigation," and this rule is properly invoked in this case. We conclude that the NLRB does not have exclusive jurisdiction over the conduct at issue on this appeal, and that the district court and its appointed officers did not err in addressing it.

Id. at 8397-98. Commercial does not even attempt to distinguish the Second Circuit's holding in Yellow Freight. Accordingly, Commercial's NLRB pre-emption argument is without merit.

5. Alternative Means of Communication

Commercial argues that the Second Circuit's holding in Yellow Freight requires this Court to apply the balancing test of NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), in order to determine whether reasonable alternative means of communication are available. The Babcock balancing test applies to non-employee union member access to an employer's premises. In Yellow Freight, the Second Circuit requested that this Court consider the availability of alternate means of communicating with Yellow Freight's employees at locations other than the jobsite. This case does not involve non-employee union member access to Commercial's premises. Rather, this case concerns whether Commercial's employees may place bumper stickers on Commercial's trailers. Babcock is simply inapposite.

6. Dismissal of Commercial's Sixth Circuit Appeal

Commercial argues that the Fifth Amendment prohibits this

Court from ordering Commercial to dismiss its appeal and motion for emergency relief pending before the United States Court of Appeals for the Sixth Circuit. In United States v. IBT, 907 F.2d 277 (2d Cir. 1990) ("All Writs"), the Second Circuit affirmed this Court's decision to enjoin lawsuits filed in other tribunals relating to the Consent Decree. Collateral lawsuits "created a 'significant risk of subjecting the Consent Decree to inconsistent interpretations and the Court Officers to inconsistent judgments.'" Id. at 280 (quoting January 17, 1990 Opinion and Order, 728 F. Supp. 1032, 1047 (S.D.N.Y. 1990)). Avoiding such a result is necessary to prevent "endless legal actions." Id.

Commercial asserts that because it is neither an affiliate nor a member of the IBT, the Second Circuit's All Writs decision is inapplicable here. Commercial once again fails to recognize the Second Circuit's decision in Yellow Freight. To reiterate, in Yellow Freight, the Second Circuit determined that pursuant to this Court's authority under the All Writs Act, 28 U.S.C. § 1651, the Election Rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election. Yellow Freight, No. 91-6096, slip op. at 8388-95. The Second Circuit affirmed this Court's ruling that this Court could exercise jurisdiction under the All Writs Act over Yellow Freight, a company employing IBT members but not itself affiliated with the IBT, because Yellow Freight was in a position to "frustrate the implementation of the Consent Decree and the election rules." Yellow Freight, No. 91-6096, slip op. at 8392-8393; see October

29, 1991 Opinion & Order, slip op. at 10 (S.D.N.Y. 1991); October 25, 1991 Order, slip op. at 6 (S.D.N.Y. 1991); May 13, 1991, Memorandum & Order, 764 F. Supp. 817, 821 (S.D.N.Y. 1991). As is evidenced by Commercial's conduct, both in its violation of the Election Rules and in its Sixth Circuit lawsuit, Commercial is clearly in a position to frustrate the implementation of the Consent Decree and the Election Rules. Thus, this Court may exercise its jurisdiction under the All Writs Act to protect its jurisdiction over the Consent Decree. Accordingly, this Court has the power to compel Commercial to dismiss its Sixth Circuit suit.

7. First Amendment

Commercial argues that by requiring Commercial to allow its motor vehicles to be used as "mobile billboards" supporting a candidate for the IBT election, the Election Officer's decision violates the First Amendment. This argument is without merit. Commercial has failed to show the existence of "state action," which is necessary to establish a violation of the United States Constitution.

Because the United States Constitution regulates the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish the challenged conduct constitutes "state action." United States v. IBT, No. 91-6052, slip op. at 6769, 6775-76 (2d Cir. Aug. 6, 1991). In this case, the Election Officer acted pursuant to the IBT

Constitution -- a private agreement -- and not pursuant to a right or privilege created by the State. Id. at 6776. In addition, the Election Officer may not fairly be said to be a state actor in this case. See id. at 6777. Accordingly, because Commercial can not establish the requisite "state action," its First Amendment claim must fail.

8. Local Civil Rule 43

Commercial argues that the Government's Order to Show Cause violates Local Civil Rule 43 because "this Court may not grant the relief sought by the Government without affording Commercial a de novo evidentiary hearing at which the Government is required to present its witnesses for cross-examination by Commercial, and at which Commercial may present evidence and witnesses of its own." (Respondent's Memorandum at 6-5). Local Civil Rule 43(b) provides in relevant part that "[i]f the alleged contemnor puts in issue his or her alleged misconduct or the damages thereby occasioned, said person shall upon demand be entitled to have oral evidence taken, either before the court or a master provided by the court."

Commercial's argument ignores that the hearing before this Court was not a contempt proceeding. Rather, the parties argued the merits of the Election Officer's decision. Commercial will not be in contempt unless and until it fails to comply fully with this Court's order within the time prescribed. Local Civil Rule 43(b) is simply not applicable. Further, if an issue of Commercial's compliance with this Court's order arises, Commercial may request

a hearing pursuant to Local Civil Rule 43(b).

9. Service of Process

Commercial argues that service of process was insufficient under Local Civil Rule 43(a), which provides that in "[a] proceeding to adjudicate a person in civil contempt of court, service shall be made personally, in the manner provided for by the Federal Rules of Civil Procedure for the service of a summons." As previously stated, Local Civil Rule 43 is inapplicable to Commercial at this point because the hearing before this Court was not "a proceeding to adjudicate a person in civil contempt of court." Id. Further, even if Local Civil Rule 43 did apply to Commercial, the Rule provides that "[w]here the alleged contemnor has appeared in the action by an attorney, the . . . order to show cause may be served upon said attorney." Id. Commercial has been represented by an attorney in this matter, as is evidenced by Commercial's October 29, 1991 letter to the Election Officer and Commercial's lawsuit in the Sixth Circuit. Accordingly, the Government's service of process on Commercial's attorney is proper under Local Civil Rule 43.

In a footnote, Commercial contends that the Government failed to adhere to the notice requirements contained in this Court's order. This Court ordered the Government to serve a fax copy of the order to show cause and supporting affidavit by 6:00 p.m. on November 15, 1991, and overnight delivery of all papers as a precautionary matter. Commercial does not contest that it received

the fax copy. Rather, Commercial contends that the Government failed to consummate overnight service by November 16, 1991.⁴

This Court finds that any deviation from this Court's order regarding service of process did not prejudice Commercial and that the Government complied sufficiently with the order's service requirements. Commercial does not provide any evidence that it was prejudiced by the Government's supposed failure to consummate overnight delivery by November 16, 1991. Commercial did receive a fax copy of the Government's papers on November 15, 1991. In addition, Commercial's local counsel received the Government's papers, including all exhibits, on November 17, 1991. Commercial's counsel certainly had sufficient notice of the issues to prepare a sixteen page memorandum of law in opposition to the Government's order to show cause and to raise the arguments addressed in this opinion. Moreover, Commercial's counsel has been aware that the Government was going to seek the instant order to show cause since it received the Government's letter of November 4, 1991. Clearly, Commercial received notice of the hearing before this Court and the issues the Government would raise. Commercial was not prejudiced by not having received overnight delivery of the Government's exhibits. Accordingly, Commercial's argument is rejected.

C. Civil Contempt

⁴ Despite Commercial's assertion that it never received overnight service, the Assistant United States Attorney representing the Government stated at the hearing that he personally effected overnight service.

A federal court may punish contempt of a lawful order, whether the order issues directly from the court or from a consent decree of the parties. United States v. City of Yonkers, 856 F.2d 444, 450 (2d Cir. 1988), rev'd on other grounds, 110 S.Ct. 625 (1990). A court may exercise its inherent power to hold a party in civil contempt when: (1) the order the party allegedly failed to comply with is clear and unambiguous; (2) the proof of non-compliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. New York State Nat'l Organ. for Women v. Terry, 886 F.2d 1339, 1351 (2d Cir. 1989). A civil contempt sanction may serve either to coerce the contemnor into future compliance or to compensate the complainant for losses resulting from the contemnor's past noncompliance. Id. at 1352. A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. United States v. City of Yonkers, 856 F.2d at 452 (2d Cir. 1988), rev'd on other grounds, 110 S.Ct. 625 (1990).

As this Court has previously stated, the Election Rules are the linchpin of the Consent Decree's attempt to cleanse the IBT of the hideous influence of Organized Crime. Yellow Freight, No. 91-6096, slip op. at 8391; July 10, 1990 Opinion & Order, 742 F. Supp. at 97. Commercial has violated the Election Rules by preventing Wosnick and other IBT members from engaging in clearly protected union election activity. In addition, Commercial's scorn

for the dispute resolution process established by the Election Rules has been as brazen as the company's treatment of Wosnick.

In the event that Commercial fails to comply with this Court's order, Commercial shall be adjudged in civil contempt, and will incur a significant coercive sanction daily until it complies as directed by this Court. In addition, an award of attorney's fees and other expenses to the Government and the court-appointed officers will serve to compensate them for Commercial's baseless refusal to comply with the Election Officer's order and frivolous lawsuit in the Eastern District of Michigan. To this end, the Government and the Election Officer are directed to submit affidavits, within ten days of the filing of this opinion and order, of attorneys' fees and other expenses incurred in connection with Commercial's refusal to comply with the Election Officer's decision and Commercial's lawsuit in the Eastern District of Michigan. Further, Commercial shall submit to this Court an affidavit by a person in a senior management position stating that it has complied with this Court's order.

E. The Stay

In the event that this Court granted the Government's application, Commercial petitioned this Court for a stay of its order. In this circuit, the standards for issuing a stay encompass the following considerations: (a) Whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (b) Whether the applicant will be irreparably injured absent a

stay; (c) Whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (d) Where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Applying these criteria to the instant application, this Court finds that Commercial fails to meet the requirements for a stay. First, as fully set forth above, the Commercial has not made a strong showing that it is likely to succeed on the merits. Second, this Court finds that Commercial will face no irreparable harm from the remedies ordered to correct its conduct in violation of the Election Rules. The third criteria is whether staying the ruling will cause injury to any other interested party. Granting a stay will prejudice Wosnick and other employees of Commercial, the candidates for IBT office, and the IBT rank and file in general. Finally, the public interest lies in furthering the noble goal of promoting democratic, secret ballot elections in the IBT.

Although Commercial is ordered to comply with this Court's order under pain of contempt, a stay in this case is particularly inappropriate. The first ever rank-and-file election for IBT International officers is currently in progress. The remedy provided herein is necessary to correct the conduct taken by Commercial in violation of the Election Rules, and to ensure a free, fair and honest election. Given that the ballots have been mailed out and are to be returned as soon as December 10, 1991, a stay of this opinion and order would constitute a victory for Commercial, a corporation that has blatantly violated the Election

Rules and brazenly ignored both the Election Officer's order and the decisions of this Court and the Second Circuit Court of Appeals. Over the years, the IBT has been tarnished with a patina of corruption, thus actions to clear this ignominious and sordid history seem indubitably in the interest of IBT officials, the IBT rank and file, and the public as well. The petition for a stay is hereby denied.

CONCLUSION

In sum, the orders of this Court are as follows:

IT IS HEREBY ORDERED that the October 23, 1991 decision of the Election Officer in Election Office Case No. P-910-LU710-CHI is affirmed; and

IT IS FURTHER ORDERED that Commercial must comply fully, within twenty-four hours of the filing of this opinion and order, with this Court's order which affirms the October 23, 1991 decision of the Election Officer in Election Office Case No. P-910-LU710-CHI; and

IT IS FURTHER ORDERED that Commercial must cause the dismissal, within twenty-four hours of the filing of this opinion and order, of its appeal to the United States Court of Appeals to the Sixth Circuit, No. 91-2247, from the dismissal of the action styled, Commercial Carriers, Inc. v. United States, No. 91-CV-75871-DT (E.D. Mich. 1991); and

IT IS FURTHER ORDERED that in the event that Commercial fails to comply fully with this Court's orders, Commercial shall be

adjudged in civil contempt, and will incur a significant coercive sanction daily until Commercial complies as directed by this Court; and

IT IS FURTHER ORDERED that Commercial shall compensate the Government and the Election Officer for their attorney's fees and other expenses incurred in connection with Commercial's baseless refusal to comply with the Election Officer's decision and in connection with Commercial's lawsuit in the Sixth Circuit; and

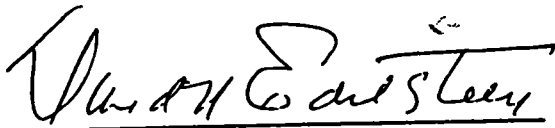
IT IS FURTHER ORDERED that the Government and the Election Officer submit affidavits, within ten days of the filing of this opinion and order, of attorneys fees and other expenses incurred in connection with Commercial's baseless refusal to comply with the Election Officer's decision and its Sixth Circuit lawsuit; and

IT IS FURTHER ORDERED that Commercial shall submit to this Court an affidavit by a person in a Senior Management position stating that it has complied with this Court's order; and

IT IS FURTHER ORDERED that Commercial's petition for a stay is denied.

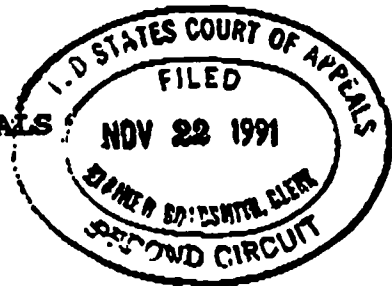
SO ORDERED.

Dated: November 19, 1991 at 9:45 AM.
New York, New York.


U.S.D.J.

UNITED STATES COURT OF APPEALS

For the Second Circuit



August Term 1991

Argued: November 20, 1991

Decided: 11/22/91

Docket No. 91-6284

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA; ANTHONY SALERNO; MATTHEW IANNIELLO; ANTHONY PROVENZANO; NUNZIO PROVENZANO; ANTHONY CORALLO; SALVATORE SANTORO; CHRISTOPHER FURNARI, SR.; FRANCIS SHEERAN; MILTON ROCKMAN; JOHN TRONOLONE; JOSEPH JOHN AIUPPA; JOHN PHILLIP CERONE; JOSEPH LOMBARDO; ANGELO LAPIETRA; FRANK BALISTRIERI; CARL ANGELO DELUNA; CARL CIVELLA; ANTHONY THOMAS CIVELLA; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, GENERAL PRESIDENT; WELDON MATHIS, GENERAL SECRETARY-TREASURER; JOSEPH TREROTOLA, FIRST VICE PRESIDENT; ROBERT HOLMES, SR., SECOND VICE PRESIDENT; WILLIAM J. MCCARTHY, THIRD VICE PRESIDENT; JOSEPH W. MORGAN, FOURTH VICE PRESIDENT; EDWARD M. LAWSON, FIFTH VICE PRESIDENT; ARNOLD WEINMEISTER, SIXTH VICE PRESIDENT; JOHN H. CLEVELAND, SEVENTH VICE PRESIDENT; MAURICE H. SCHURR, EIGHTH VICE PRESIDENT; DONALD PETERS, NINTH VICE PRESIDENT; WALTER J. SHEA, TENTH VICE PRESIDENT; HAROLD FRIEDMAN, ELEVENTH VICE PRESIDENT; JACK D. COX, TWELFTH VICE PRESIDENT; DON L. WEST, THIRTEENTH VICE PRESIDENT; MICHAEL J. RILEY, FOURTEENTH VICE PRESIDENT; THEODORE COZZA, FIFTEENTH VICE PRESIDENT; DANIEL LIGUROTIS, SIXTEENTH VICE PRESIDENT; and SALVATORE PROVENZANO, FORMER VICE PRESIDENT,

Defendants.

COMMERCIAL CARRIERS, INC.,

Non-party Appellant.

BEFORE: PRATT, MAHONEY, and McLAUGHLIN, Circuit Judges.

2 Commercial Carriers, Inc. appeals from an order of the
3 United States District Court for the Southern District of New York,
4 David N. Edelstein, Judge, which, inter alia, ordered Commercial to
5 allow union members "to place or affix stickers and similar cam-
6 paign items" to Commercial's vehicles.

7 We reverse the order and vacate the injunction; an
8 opinion will follow.

9 EDWARD T. FERGUSON, Assistant United
10 States Attorney for the Southern
11 District of New York (Otto
12 Obermaier, United States Attorney
13 for the Southern District of New
14 York), for Plaintiff-Appellee.

15 MARK A. JACOBY, New York, NY (Weil
16 Gotshal & Manges, New York, NY,
17 of Counsel), for Non-Party
18 Appellant.

19 PER CURIAM:

20 As part of the continuing effort to implement the consent
21 decree between the International Brotherhood of Teamsters ("IBT")
22 and the government, see, e.g., United States v. Int'l Brotherhood
23 of Teamsters, 931 F.2d 177 (2d Cir. 1991), election officer Michael
24 H. Holland directed Commercial Carriers, Inc. ("Commercial") "to
25 allow IBT members to place or affix stickers and similar campaign
26 items on the vehicles, both cabs and trailers, driven by IBT

1 members while they are performing services for the company." Judge
2 Edelstein affirmed the election officer's decision at 9:45 am on
3 November 19, 1991, and ordered Commercial to fully comply with the
4 order within 24 hours or face civil contempt charges. Commercial
5 immediately moved this court for emergency relief, and we heard
6 argument on November 20, 1991.

7 The parties agreed to treat this as an appeal on the
8 merits, and doing so, we reverse the district court's order and
9 vacate the injunction. In view of the imminence of the IBT elec-
10 tions, the mandate shall issue forthwith; an opinion will follow.